

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 October 2004

Case No.: 2003-BLA-5703

In the Matter of

ERNEST BROWN
Claimant

v.

NALLY & HAMILTON ENTERPRISES
Employer

LIBERTY MUTUAL INSURANCE COMPANY
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

APPEARANCES:

Monica Rice Smith, Esq.
For the Claimant

Francesca Maggard, Esq.
For the Employer

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

Mr. Brown attended the formal hearing held October 7, 2003, in Hazard, Kentucky. I afforded both parties the opportunity to offer testimony, question witnesses, to introduce evidence and thereafter, closed the record. I based the following Findings of Fact and Conclusions

of Law upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformity with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, EX and CX refer to the exhibits of the Director, the employer and claimant, respectively.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History

Ernest Brown filed a claim for benefits on May 17, 2001. (DX 2). The District Director denied benefits under the instant claim stating that Mr. Brown failed to show:

1. That he has pneumoconiosis as defined by the Act and the regulations;
2. That his pneumoconiosis arose out of coal mine employment;
3. That he is totally disabled due to pneumoconiosis. (DX 22).

Failure to establish any one of these elements will result in denial of the claim. *Hall v. Director, OWCO*, 2 B.L.R. 1-1998 (1980). Claimant timely appealed the Director's Proposed Decision and a hearing in this matter was held before the undersigned.

Remaining Issues

The parties contest the length of coal mine employment, existence of pneumoconiosis and its causation as well as the fact that the miner is totally disabled due to coal mine employment.¹ (ALJX 1).

Factual Background

Mr. Brown, born February 4, 1935, claims to have worked in the Nation's coal mines for approximately 19 years. (DX 2). The Director found fourteen years of coal mine employment between 1953 to January 18, 1991. (DX 22). During his employment, he performed work as a truck driver hauling rock and coal and also worked hand-loading coal. (TR 10-13). He last worked in the coal mines around 1991. He completed second grade in school and is currently married to Delilah Brown. (TR 10).

¹ The contested issue also lists "subsequent claim" and "modification" as issues. However, the record is void of any evidence of prior claims.

Mr. Brown reported a non-smoking history. He reports being very short of breath, unable to climb uphill and that he smothers at night. (TR 14-15). He also has Parkinson's disease and this causes some impairments with movement.

Work History

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. Claimant bears the burden of proof in establishing the length of his coal mine work. *See Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984); *Rennie v. U.S. Steel Corp.*, 1 BLR 1-859, 1-862 (1978). The length of a miner's coal mine work history must be computed as provided by 20 C.F.R. § 725.101(a)(32). *See* 20 C.F.R. § 718.301.

Claimant contends that he worked in the mines for approximately nineteen years but offered no other proof or testimony to substantiate this assertion. *Supra*. His social security earnings records reflect fourteen years of employment in the Nation's coal mines. (DX 9). Consequently, I find that Claimant has established fourteen years of coal mine employment.

Medical Evidence

Medical evidence submitted with a claim for benefits under the Act is subject to the requirement that it must be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. *See*, 20 C.F.R. §§ 718.101 to 718.107. The regulations address the criteria for chest x-rays, pulmonary function tests, physician reports, arterial blood gas studies, autopsies, biopsies and "other medical evidence." *Id.* "Substantial compliance" with the applicable regulations entitles medical evidence to probative weight as valid evidence.

Secondly, medical evidence must comply with the limitations placed upon the development of medical evidence. 20 C.F.R. § 725.414. The regulations provide that claimants are limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy, and two medical reports as affirmative proof of their entitlement to benefits under the Act. § 725.414(a)(2)(i). Any chest x-ray interpretations, pulmonary function test results, arterial blood gas study results, autopsy reports, biopsy reports, and physician opinions that appear in one single medical report must comply individually with the evidentiary limitations. *Id.* In rebuttal to evidence propounded by an opposing party, a claimant may introduce no more than one physician's interpretation of each chest x-ray, pulmonary function test, or arterial blood gas study. § 725.414(a)(2)(ii). Likewise, the district director is subject to identical limitations on affirmative and rebuttal evidence. § 725.414(a)(3)(i-iii).

A. X-ray reports

<u>Exhibit</u>	<u>Date of X-ray</u>	<u>Date of Reading</u>	<u>Physician/Qualifications</u>	<u>Interpretation</u>
DX 9	07/11/01	07/11/01	Baker	"0/1" / 2 quality

<u>Exhibit</u>	<u>Date of X-ray</u>	<u>Date of Reading</u>	<u>Physician/Qualifications</u>	<u>Interpretation</u>
DX 10	02/06/02	02/06/02	Hussain	Negative / 2quality
DX	02/06/02	04/10/02	Sargent/BC & B-reader	2 quality read only
EX 1	05/14/03	05/14/03	Dahhan/BC & B-reader	"0/0" / no abnormalities consistent with pneumoconiosis

B. Pulmonary Function Studies²

<u>Exhibit/Date</u>	<u>Physician</u>	<u>Age/Height</u>	<u>FEV₁</u>	<u>FVC</u>	<u>MVV</u>	<u>FEV₁/FVC</u>	<u>Tracings</u>	<u>Comments</u>
EX 1	Dahhan	68/69"	2.52 pre 2.59 post	3.37 3.22	45 61	75% 80%	Yes Yes	
DX 9	Baker	66/68"	2.52	3.28	70	77%	Yes	Normal
DX 10	Hussain	67/69"	2.44 pre 2.61 post	3.50 4.23	62 --	70% 62%	Yes Yes	Mild airway obstruction

*testing after administration of bronchodilator

C. Arterial Blood Gas Studies

<u>Exhibit</u>	<u>Date</u>	<u>Physician</u>	<u>pCO₂</u>	<u>pO₂</u>	<u>Resting/Exercise</u>	<u>Comments</u>
EX 1	05/14/03	Dahhan	38.0	80.3	Resting	
DX 9	12/05/01	Baker	41.0	78.0	Resting	Mild resting arterial hypoxemia
DX 10	02/06/02	Hussain	42.5 62.9	97 93	Resting Exercise	

D. Narrative Medical Evidence

Glen R. Baker, Jr., M.D., a board-certified physician in pulmonary and internal medicine, provided a consultative medical summary and performed a complete physical examination on July 11, 2001. (DX 9). He obtained a smoking and coal mine employment history (nineteen years) as well as an account of past medical diagnosis, current symptoms (dyspnea, cough,

² Because the physicians conducting pulmonary function studies noted varying heights, I must make a finding on the Miner's height. See *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221, 1-223 (1983). Based on the height most frequently noted in the entire record, I find the Miner's height to be 69" inches.

sputum production), a family history and a review of his systems. *Id.* Mr. Brown has no history of smoking. (DX 9). Dr. Baker relied on an x-ray interpretation and a pulmonary function study as well as a physical examination. *Id.* The examination revealed clear lungs and no wheezes or rales. *Id.* He noted that Mr. Brown had the physical stigmata of Parkinson's disease. Dr. Baker diagnosed Parkinson's disease and mild bronchitis. Based on the x-rays, Dr. Baker ruled out the presence of pneumoconiosis or any pulmonary impairment.

The Director provided a medical summary, a chest x-ray, blood gas studies and pulmonary function tests conducted by Imtiaz Hussain, M.D., an attending physician in pulmonary medicine. (DX 10). Dr. Hussain conducted a complete physical examination, work history, medical history, and pulmonary function analysis on February 6, 2001. *Id.* His examination revealed normal thorax and lung functions including normal bronchi bilaterally on auscultation. *Id.* According to Dr. Hussain, the pulmonary function studies revealed mild airway obstruction. The chest x-ray and the arterial blood gas studies were normal. He diagnosed a mild impairment due to chronic obstructive pulmonary disease but as to etiology, this doctor wrote "smoking" with a question mark. He stated that Claimant retains the respiratory capacity to return to coal mine employment.

The Employer submitted a consultative report of the examination of Mr. Brown conducted by A. Dahhan, M.D. (EX 1). Dr. Dahhan is board-certified in pulmonary and internal medicine. *Id.* Prepared on May 14, 2003 the report includes a medical examination, smoking and work history, medical history and analysis of the objective medical tests as outlined above. *Id.* The physical examination showed no clubbing or edema, and good air entry into both lungs with no crepitation, rhonchi or wheeze. *Id.* Also noting Mr. Brown's non-smoker status, Dr. Dahhan reported a daily cough with clear productive sputum. Mr. Brown reported that he occasionally wheezes but does not use bronchodilators and suffers dyspnea on exertion such as when climbing uphill. *Id.*

Dr. Dahhan opined that Mr. Brown does not have pneumoconiosis or any other pulmonary impairment based on a negative chest x-ray showing clear lungs, normal blood gas studies and normal pulmonary function tests. In his opinion, Mr. Brown retains the respiratory capacity to return to his previous coal mining employment although he does experience significant chest wall stiffness due to Parkinson's. This stiffness, however, causes a mild reduction in respiratory mechanics. (EX 1).

DISCUSSION AND APPLICABLE LAW

Pneumoconiosis and Causation

Section 718.202 provides four means by which pneumoconiosis may be established: by chest x-ray, a biopsy or autopsy, by presumption under §§ 718.304, 718.305 or 718.306, or if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the

miner suffers from pneumoconiosis as defined in § 718.201.³ 20 C.F.R. § 718.202(a). Pneumoconiosis is defined in § 718.201 as a chronic dust disease arising out of coal mine employment. It is within the administrative law judge's discretion to determine whether a physician's conclusions are adequately supported by documentation. *Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46, 1-47 (1985). "An Administrative Law Judge may properly consider objective data offered as documentation and credit those opinions that are adequately supported by such data over those that are not." *See King v. Consolidation Coal Co.*, 8 B.L.R. 1-262, 1-265 (1985).

The X-ray Evidence:

The submitted evidence contains three interpretations and one quality reading of three chest x-rays. Under section 718.202(a)(1), a finding of pneumoconiosis may be based on x-ray evidence. All of the x-ray interpretations are negative for pneumoconiosis and thus pneumoconiosis is not established by this evidence.

Medical Opinion Evidence:

The record reveals the opinions of three physicians: none of whom diagnosed Claimant with pneumoconiosis. Admittedly, Dr. Hussain stated "COPD," yet he did not attribute this ailment to coal dust exposure. Where Claimant bears the burden of proof on this element, it is irrelevant whether I find these opinions worthy of probative weight where none of these physicians diagnosed pneumoconiosis or any respiratory impairment due to coal dust exposure. Therefore, I find that the medical opinion evidence does not establish the presence of pneumoconiosis.

Total Disability Due to Pneumoconiosis:

Assuming that Claimant established the presence of pneumoconiosis, he must also establish that he is totally disabled due to pneumoconiosis. A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. 718.204(b)(1). Under section 718.204(b)(2), there are several criteria for establishing total disability and the applicable criteria under these facts are: by qualifying pulmonary function tests or arterial blood gas studies and by a physician's reasoned medical judgment based on medically acceptable clinical and laboratory diagnostic techniques.⁴ 20 C.F.R. 718.204(b)(2)(i) and (iii). I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike, to determine whether

³ Only the X-ray evidence and the physicians' opinions are applicable under these facts. Section 718.202(a)(2) is inapplicable herein because there are no biopsy or autopsy results. Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of the several presumptions is found to be applicable. In the instant case, Section 718.304 does not apply because there is no x-ray, biopsy, autopsy or other evidence of large opacities or massive lesions in the lungs. Section 718.305 is not applicable to claims filed after January 1, 1982. Section 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982.

⁴ Section 718.204(b)(2)(iii) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Pulmonary Function Tests

All pulmonary function study evidence must be weighed including testing done both pre- and post-bronchodilator administration. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980), *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984). However, little or no weight may be accorded to a ventilatory study where the miner exhibited “poor” cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984). To be qualifying, the FEV₁ as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1-154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study, which is not accompanied by three tracings, may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984).

Turning to the evidence, I note that none of the tests produced qualifying results. Therefore, total disability is not established by this method.

Arterial Blood Gas Studies

All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984); *Lesser v. C.F. & I. Steel Corp.*, 3 B.L.R. 1-63 (1981). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984).

The record contains three arterial blood gas studies. The reports indicate no contradiction of the regulatory quality standards, and consequently, I accord each blood gas probative weight on the issue of total disability. No study produced qualifying values. Thus, the preponderance of the arterial blood gas study evidence weighs against a finding of total disability.

Medical Summaries

Where a claimant cannot establish total disability under subparagraphs (b)(2)(i), (ii), or (iii), Section 718.204(b)(2)(iv) provides another means to prove total disability. Under this section, total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a

respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp.*, 2 BLR 1-130 (1979). A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

The record contains three opinions, yet none of these physician's opined that Claimant is totally disabled or lacks the respiratory capacity to return to his former coal mine employment. It is irrelevant whether the reports are well-documented or well-reasoned where Claimant bears the burden of proof on all elements and he has failed to produce any evidence of total disability. Therefore, total disability has not been established.

Conclusion

After a review of the record in its entirety, the conditions of entitlement have not been met and, therefore, the claim of Mr. Ernest Brown is denied.

Attorney's Fees

The award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS:

Any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board **within thirty (30) days** from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board, Suite 500, 800 K. Street, N.W., Washington, DC 20001-8001. 20 C.F.R. § 725.481. A copy of a Notice of Appeal must also be served upon Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Francis Perkins Bldg., Room N-2605, 200 Constitution Avenue, N.W., Washington, DC 20210.